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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 182

FORD MOTOR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 183

FORD MOTOR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The orders of the Circuit Court of Appeals (R. 51, 108) were entered without opinion and are unreported. The order of the National Labor Relations Board appears at R. 3.[1]

[1] The original findings of fact, conclusions of law and order of the National Labor Relations Board are reported in 4 N. L. R. B. 621.

JURISDICTION

The orders of the court below were entered on May 5, 1938, and June 10, 1938, respectively (R. 51, 108). The petition for writs of certiorari was filed on July 7, 1938, and granted on October 10, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 18, 1925.

QUESTIONS PRESENTED

In No. 182

Whether the Circuit Court of Appeals erred in granting the motion of the National Labor Relations Board for leave to withdraw its petition for enforcement so that the Board might set aside its order and take further proceedings.

In No. 183

Whether the Circuit Court of Appeals had jurisdiction to take any action in the case.

Whether, if the Circuit Court of Appeals had jurisdiction, it had power to remand the case to the Board for the purpose of setting aside its order and taking further proceedings.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; U. S. C., Supp. III, Sec. 151 *et seq.*) are set forth in Appendix A, *infra*, pp. 62–64.

STATEMENT*

On January 7, 1938, pursuant to Section 10 (e) of the National Labor Relations Act, the Board filed in the court below in No. 182 (No. 7919 below, hereinafter called the Board's case) a petition for enforcement of its order issued pursuant to Section 10 (c) of the Act against petitioner on December 22, 1937, and at the same time filed a certified transcript of the record in the proceeding before the Board (R. 1–5, 6). On January 10, 1938, the certified transcript was supplemented to include petitioner's return to the Board's decision and order (R. 8).

On April 11, 1938, petitioner filed an answer to the Board's petition for enforcement (R. 9–34), contesting the validity of the Board's order. Various grounds were relied upon, one of which was that petitioner had been denied a full and fair hearing in that from August 3, 1937, when the proceedings before the trial examiner were transferred to the Board until December 23, 1937, when the Board's decision and order were served upon petitioner, the Board did not communicate with petitioner with respect to the proceeding and did not afford petitioner an opportunity to object or except before the Board to any intermediate report or to any proposed findings of fact or order (R. 12). The answer prayed that the Board's petition be

*A chronological statement of the facts in both cases is set out in Appendix B, *infra*, pp. 65–68.

denied and dismissed, and that the Board's order be set aside and the proceeding be remanded to the Board with directions to dismiss the complaint (R. 21).

On May 2, 1938, following the decision of this Court on April 25, 1938, in *Morgan* v. *United States*, 304 U. S. 1, the Board, pursuant to notice of April 29, 1938 (R. 35), filed in the court below a motion for leave to withdraw its petition for enforcement and the transcript of record without prejudice, for the purpose of having further proceedings (R. 36–38). In support of the motion the Board adverted to the *Morgan* decision and to petitioner's answer, and stated that if the motion were granted the Board would then set aside its order, pursuant to Section 10 (d) of the Act, issue proposed findings to which the parties would be permitted to file exceptions and, if they so desired, to argue objections before the Board, and thereafter make its decision and order, or take such further or other action as might be deemed advisabde (R. 37). On May 5, 1938, petitioner filed a memorandum in opposition to the Board's motion (R. 41–50). On the same date the court issued an order granting the Board's motion (R. 51). On the following day, May 6, 1938, the Board, pursuant to the order and in furtherance of the purpose set forth in its motion, served notice on petitioner that on May 10, 1938, unless sufficient cause to the contrary should then appear, the Board would vacate and set aside its findings and order of December 22, 1937, for the

purpose of further proceedings before the Board (R. 54).[2] On May 10, 1938, due to petitioner's objection that the Board was without jurisdiction to proceed in view of the pendency of a petition to review the Board's order filed by petitioner (see *infra*) the Board held its action under advisement (R. 87). On June 4, 1938, petitioner filed a motion to vacate the court's order of May 5 granting the Board's motion for leave to withdraw (R. 56). This motion was denied on June 10, 1938, but the withdrawal[3] of the petition for enforcement was stayed pending application for a writ of certiorari (R. 58).

No. 183

Petitioner's case (No. 183, No. 8019 below) was initiated on May 4, 1938, by a petition, purportedly filed pursuant to Section 10 (f) of the Act, to set

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[2] In view of the wording of Section 10 (d), the Board deemed such notice more appropriate than a forthwith setting aside of its order.

[3] The Board had not physically withdrawn either the petition for enforcement or the certified transcript of the record from the clerk's office. It did not conceive that the granting of its motion contemplated or allowed the removal of any of the permanent records of the court (cf. *Cheney* v. *Hughes*, 138 U. S. 403) and, in addition, it believed that it had exercised the leave granted to it by the court by its notice of May 6, a copy of which was filed in the court on May 9 (R. 54–80). To avoid any conceivable doubt as to the Board's discontinuance, on June 2, 1938, after receipt of notice of petitioner's motion to vacate the order of May 5, the Board filed a formal withdrawal of its petition for enforcement (R. 55).

aside the Board's order (R. 62). May 4, 1938, the filing date, was prior to the court's order of May 5 granting the Board's motion for leave to withdraw its petition for enforcement, but was two days subsequent to the filing of that motion, and five days subsequent to the service of notice of that motion upon petitioner (R. 35). On May 4, 1938, petitioner also filed a motion for an order directing that the cases be consolidated and that the transcript of record filed in the Board's case be deemed filed in the consolidated case (R. 39). On May 5, 1938, petitioner filed in its case a motion noticed for May 9, 1938, for an order directing that the certified transcript of record filed in the Board's case be deemed to have been filed in petitioner's case, or that the Board provide petitioner with a certified transcript of the entire record in the proceeding before the Board[4] and that the Board be enjoined from taking any action until five days thereafter (R. 78). On May 9, 1938, notwithstanding the further proceedings then in progress and pending before the Board, the court, amending its order of May 5 in so far as it permitted the withdrawal of the certified transcript of record in the Board's case, ordered that the certified transcript of record be and remain in the files of the court (R. 54), and

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[4] Petitioner at no time made a request of the Board for a certified transcript of the record (see R. 78–79). Contrast *In re Petition of National Labor Relations Board*, No. 21, Original, October Term, 1937, decided May 31, 1938.

further ordered that such transcript be deemed to have been filed in petitioner's case as of the date of the filing of its petition for review (R. 80). Following the decision of this Court in *In re Petition of National Labor Relations Board*, No. 21, Original, October Term, 1937, decided May 31, 1938 (reprinted R. 90–102), the Board on June 2, 1938, filed in petitioner's case a motion to vacate and set aside the order directing that the certified transcript of the record filed in the Board's case be deemed to have been filed in petitioner's case as of the date of the petition for review (R. 85), and also filed a motion to remand the cause to the Board for further proceedings in the event that the court denied the motion to vacate (R. 103). The Board in its motion to remand advised the court that if the motion were granted the Board forthwith would set aside its findings and order of December 22, 1937, issue proposed findings to which the parties would be permitted to file exceptions and argue objections before the Board if they so desired, and thereafter, upon reconsideration of the entire case, make its decision and order, or take such further action as might be deemed advisable (R. 104). On June 10, 1938, the court issued an order denying the Board's motion to vacate but granting its motion to remand (R. 108). The court stayed the order of remand for 30 days pending application by petitioner to this Court for writs of certiorari and until final disposition thereof by this Court (R.

108). The court sustained objections to interrogatories which had been propounded by petitioner and ordered the interrogatories stricken from the record (R. 108), and denied other motions and applications of petitioner not now in question or material (R. 58, 108).

On July 7, 1938, petitioner filed a petition for, and on October 10, 1938, this Court granted a writ of certiorari to review the order of May 5, 1938, in the Board's case, granting the Board's motion for leave to withdraw its petition for enforcement without prejudice, and a writ of certiorari to review the order of June 10, 1938, in petitioner's case, remanding the cause to the Board.

SUMMARY OF ARGUMENT

I

No. 182

The order of the court below under review in this case is the order of May 5, 1938, granting the Board's motion for leave to withdraw its petition in accordance with its intention, following the decision in *Morgan* v. *United States*, 304 U. S. 1, to set aside its previous order and grant to petitioner the opportunity to except to proposed findings of fact and to make an oral or written argument to the Board. Petitioner, although it was being accorded what it had theretofore complained had been denied to it, opposed the Board's motion.

Notwithstanding that opposition, the Board, as a plaintiff, was entitled by the well-settled rule to discontinue its action. *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 93; *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 19.

A. Petitioner contends, first, that the rule has no application to proceedings to review an order of the Board. The sole reason advanced is that here, unlike ordinary litigation, there will probably be further proceedings before an administrative tribunal. That factor does not prove the rule inapplicable. It can equally well be evaluated in the light of the cases under the rule, and, when so considered, it is without weight.

B. Nor is there any applicable exception or qualification in the general rule. The claim that the prospect of further proceedings before the Board differs from the prospect of a second litigation, which admittedly is no bar to a dismissal, is without merit. The claim is completely formal, for the proceedings which petitioner now says are prejudicial are precisely those which it complains were denied to it. Furthermore, the contention necessarily rests on the assumption that the proposed further proceedings will be invalid or futile. Neither assumption may be made. The Court will not assume that the further proceedings will be irregular. Nor will they be futile, because, as many cases show, even if the court had passed upon and sustained petitioner's procedural objections to the order, the decision would have been no bar to

further proceedings before the Board and to the entry of a new order.

The claim that petitioner would be prejudiced because it had become entitled to affirmative relief on the filing of its answer is equally without merit. The answer prayed for no different or greater relief than that which petitioner would have obtained had it successfully defended the Board's action. Such a prayer can not be considered a prayer for affirmative relief. Moreover, even if petitioner had asked for affirmative relief, it cannot meet the further requirement that it was prejudiced.

However, even if petitioner were prejudiced in any way, the granting of the motion to dismiss was plainly within the discretion of the court below. *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 146. Petitioner did not in the lower court, and does not now in this Court, charge an abuse of discretion. Indeed, the question is probably not even before the Court. *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182.

C. Nor does the Act require that, once a Circuit Court of Appeals has obtained jurisdiction, it must proceed to a decree affirming, modifying, or setting aside the order of the Board. The Act does not so state, and petitioner does not explain why it should be so construed. The Court will not assume a misuse of the Board's right to withdraw. Nor will

the Court speculate as to the validity of the contemplated further proceedings. *In re Petition of National Labor Relations Board, supra.*

II

No. 183

This case involves the order of June 10, 1938, remanding petitioner's case to the Board in order that it might set aside its order and take further proceedings. We believe that the order should be reversed with instructions to dismiss the petitioner's case because the court below never obtained jurisdiction.

Several jurisdictional prerequisites are lacking. First, petitioner is not a "person aggrieved" within the meaning of Section 10 (f). Its case was only a technical maneuver to prevent the Board from setting aside its order. The decision in *In re Petition of the National Labor Relations Board, supra,* is directly in point.

Second, there was never a transcript of the record filed as required by Section 10 (f). Jurisdiction did not attach by the filing of the petition to review. Prior to the attaching of jurisdiction, there had to be at least an order consolidating the cases, or deeming a transcript already on file to be filed in the case, and notice thereof given. Such an order was made on May 9, 1938, but at that time the court had granted the Board leave to with-

draw its petition for enforcement and the transcript of the record, the Board had, pursuant to this leave, reasserted its own jurisdiction, and the jurisdiction of the court below had come to an end. Once it had been lost it could not thereafter be regained. The attempt to make the order retroactive was unavailing. *Ex parte Skinner & Eddy Corp., supra,* at 95.

Finally, the record which was before the court was not the "entire record" required by Section 10 (f). In view of the notice of May 6, 1938, by which the Board had instituted the further proceedings for which it had withdrawn its case, the record which had theretofore been filed did not exhibit "the Board's final action." *In re Petition of National Labor Relations Board, supra.*

III

No. 183

If the court below did have jurisdiction to enter the order remanding petitioner's case to the Board, its order was correct and should be affirmed. There was no lack of power in the court to remand the case, and the power was correctly exercised.

A. Many decisions of this Court demonstrate that a Circuit Court of Appeals possesses an inherent power to remand a case to an administrative tribunal. The power has been recognized in many cases involving the Federal Trade Commission and

the Interstate Commerce Commission, and it has been exercised by four Circuit Courts of Appeals in cases arising under this Act. There is nothing in the Act which negatives this inherent power.

B. Nor was the court below, in the exercise of this power, required to set aside the order of the Board before remanding the case. Actually, petitioner's unsupported contention to the contrary is wholly formal, because the form of the remanding order is of no practical consequence. Further proceedings could be had whether the order was set aside by the court or not.

Apart from that, however, it has never been held that a Circuit Court of Appeals, in remanding a case to an administrative tribunal, must either enter a formal reversal or determine the validity of the order before remanding it. The action of the court below is in accord with that of three other Circuit Courts of Appeals under this statute. It is supported by the closely analogous cases in which an appellate court, without reversing the decree of the lower court, grants the latter's request for the return of the record for further proceedings or sends it back without such a request. It is also supported by the cases in which a court has remanded a report to a master for reconsideration without setting aside the report.

There are many other instances in which this Court has declined to decide the issues but has entered purely formal reversals and has remanded

the cause for further proceedings. In those cases formal reversals served either to enable the lower court to take further proceedings after its term had expired, or to preserve the right of the parties to a later appeal on the merits. In *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, on which petitioner relies, the term of the District Court had expired. In the present case, since the Board has no term, a formal reversal would have served no purpose.

ARGUMENT

I

No. 182

THE MOTION OF THE BOARD FOR LEAVE TO WITHDRAW ITS PETITION WITHOUT PREJUDICE WAS PROPERLY GRANTED

The order of the court below under review in this case (No. 182, No. 7919 below) is the order of May 5, 1938 (R. 51), granting the Board's motion for leave to withdraw its petition without prejudice.[5] The motion was made by the Board in accordance with its determination, following the decision of this Court in *Morgan* v. *United States*, 304 U. S. 1, not only to change its practice for the future, but also, in all pending cases in which complaint had been made of the omission of an intermediate re-

[5] The order of May 5, 1938, was amended, insofar as it allowed the withdrawal of the certified transcript of the record, by an order of May 9, 1938 (R. 54), that the transcript remain in the files of the court.

port or proposed findings, and of the absence of oral or written argument to the Board, to vacate its orders, restore the cases to its docket, and to reconsider and redetermine them after full opportunity to all parties to make exception to proposed findings and to make oral or written presentation of their contentions. See *In re Petition of National Labor Relations Board, supra.* In accordance with that determination, the Board, in several cases other than the instant one, discontinued its petitions for enforcement after the records had been filed in the Circuit Court of Appeals.[8] In the present case, although petitioner first complained of the absence of an intermediate report and of other proceedings before the Board, and prayed that the Board's order be set aside (R. 9, 21), it has now chosen to resist the motion by which the Board sought voluntarily to set aside its order and to have the proceedings, the lack of which it had protested.

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[8] *National Labor Relations Board* v. *Protective Motor Service Co.*, June 27, 1938 (C. C. A. 3d); *National Labor Relations Board* v. *Cherry Cotton Mills*, August 22, 1938 (C. C. A. 5th); *National Labor Relations Board* v. *Washington Manufacturing Co.*, June 29, 1938 (C. C. A. 6th). The motion of the Board to withdraw or dismiss without prejudice was granted in each case. The motion of the Board to remand the cause upon a petition to review after the filing of the record was granted in *North Whittier Heights Citrus Ass'n* v. *National Labor Relations Board*, 97 F. (2d) 1010 (C. C. A. 9th), pending on petition for certiorari, No. 340.

Despite that opposition the Board, standing in this case as plaintiff in the court below, was entitled as of course to discontinue its action. The general rule is well settled in the federal courts. A plaintiff has a substantial right to dismiss or withdraw his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant other than the prospect of a second litigation upon the subject matter of the complaint or bill. The right is absolute; although an application must be made, the court does not have even a discretionary power to deny a plaintiff's request under such circumstances. *Jones* v. *Securities & Exchange Commission,* 298 U. S. 1, 19; *Ex parte Skinner & Eddy Corp.,* 265 U. S. 86, 93; *Barrett* v. *Virginian Ry. Co.,* 250 U. S. 473, 476; *McGowan* v. *Columbia River Packers' Ass'n,* 245 U. S. 352, 358; *Pullman's Palace Car Co.* v. *Central Transportation Co.,* 171 U. S. 138, 146; *Veazie* v. *Wadleigh,* 11 Pet. 55, 59, 61–62; *City of Detroit* v. *Detroit City Ry. Co.,* 55 Fed. 569, 572 (C. C. E. D. Mich.). The right plainly exists in favor of the Government, as well as in favor of other parties plaintiff. Cf. *Confiscation Cases,* 7 Wall. 454, 457, 458; *United States* v. *Brooks,* 44 Fed. 749 (Wash.); *United States* v. *Woody,* 2 F. (2d) 262 (Mont.); *United States* v. *Rossi,* 39 F. (2d) 432, 433 (C. C. A. 9th).

Petitioner's attempt to avoid the application of the rule is based upon three grounds. First, it contends (Br., pp. 27–28) that the rule with respect to voluntary dismissals stated in the cases cited above is completely without application to proceedings for enforcement or review of orders of the Board. Second, it contends (Br., pp. 29–37) that, even if the rule is applicable, it does not, because of its qualifications or exceptions, sanction the dismissal of the Board's petition in the present case. Finally, it contends (Br., pp. 17–27) that the provisions of the National Labor Relations Act prevent the voluntary dismissal of the Board's petition. We shall discuss each in turn.

A. THE GENERAL PRINCIPLES GOVERNING VOLUNTARY DISMISSALS ARE APPLICABLE TO PROCEEDINGS FOR ENFORCEMENT OF ORDERS OF THE BOARD

Petitioner's first contention is that the general principle stated above is wholly without application to a proceeding for review of an order of the Board. Br., pp. 27–28. The argument does not rely upon any provision of the Act; rather, it attempts to establish a fundamental inapplicability of the rule solely upon the ground that where a petition for enforcement is dismissed there may be further proceedings before an administrative tribunal, whereas when an ordinary civil litigation is ended by a voluntary dismissal there is likely to be at least a temporary termination of all further action.

The contention is easily disposed of. It does not in the least demonstrate that the general rule is inapplicable, but rather presents an argument—an unsound one, as we shall show below (pp. 19–23)—for the application of one of the well-settled exceptions to the rule: that a plaintiff will not be allowed voluntarily to dismiss his action if the defendant will be prejudiced in some other way than by the prospect of further litigation. On that basis the argument is without merit. Moreover, a voluntary dismissal will be granted even if it is sought for the express purpose of instituting or continuing the litigation in other courts. *Harding* v. *Corn Products Refining Co.*, 168 Fed. 658, 665 (C. C. A. 7th), certiorari denied, 214 U. S. 515; *Prudential Insurance Co. of America* v. *Stack*, 60 F. (2d) 830, 832 (C. C. A. 4th); *Aetna Life Ins. Co. of Hartford, Conn.* v. *Wilson*, 84 F. (2d) 330, 331 (C. C. A. 4th). See *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 92, 93, 95; *City of Detroit* v. *Detroit City Railway*, 55 Fed. 569, 571–572 (C. C. E. D. Mich.).

B. THE RULE ALLOWING VOLUNTARY DISMISSALS HAS NO QUALIFICATION OR EXCEPTION WHICH APPLIES TO THE PRESENT CASE

Petitioner also contends that, even if the present case is to be governed by the general rule with respect to voluntary dismissals, nevertheless the court below erred in allowing the dismissal of the Board's case. The contention is founded upon the ground that petitioner would be prejudiced, first, by something other than the prospect of a second

litigation (Br., p. 28), and, second, by the waste of its time and energy in preparing its case for "affirmative relief" (Br., pp. 27–37). We believe both contentions to be unsound, not only because the asserted prejudices do not in fact exist but also because, even if there were prejudice, the dismissal was discretionary with the court below, and the discretion cannot be said to have been abused.

1. Petitioner's contention (Br., p. 28) that it would be prejudiced by something other than the prospect of a second litigation (*Ex parte Skinner & Eddy Corp., supra*) is based upon the fact that it must partake in further proceedings before the Board. It is this factor which is relied upon in Part A, *supra*, as the basis for petitioner's contention that the general rule stated in the *Skinner & Eddy* case has no application whatever to proceedings for the review of Board decisions. As we there indicated, this contention should be considered in the light of cases under the rule, rather than a consideration over and above it.

When so considered, it is entirely without foundation. There are several reasons why the prospect of further proceedings before the Board cannot be considered different from the prospect of a second litigation, which is admittedly insufficient to bar the exercise of an absolute right to dismiss. See pp. 17–18, *supra*. At best, petitioner's contention is a highly formal one which completely lacks reality. The "further proceedings" which petitioner now claims will prejudice it are precisely those which petitioner complained,

both to the Board and to the court below, had been denied to it (R. 17, 30–31). Indeed, in view of petitioner's allegation that the order of the Board should be reversed for lack of a fair hearing before the Board, petitioner should consider it a saving rather than a prejudice to have the further proceedings without the necessity of litigation.

Moreover, it is plain that the prospect of further proceedings before an administrative tribunal is simply the prospect of further litigation. The rule is not conditioned on the *certainty* of further proceedings. See pp. 17–18, *supra*. Nor are proceedings before an administrative tribunal more prejudicial than those before a court. In fact, the contrary is probably true. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209. Such proceedings are simply "part of the social burden of living under government." *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. (2d) 97, 100 (C. C. A. 5th), certiorari denied, 299 U. S. 559. Wholly apart from the fact that the proceedings are exactly what petitioner has previously asked for, therefore, the proceedings do not form any sound basis upon which to base a claim of prejudice.

The validity of this conclusion becomes even clearer when one examines the premises upon which the argument rests. Obviously, petitioner can

claim that the further proceedings before the Board will be prejudicial only upon the assumption that they will be invalid, or that, if the case were to be decided in the court below, it would be ended entirely—that the court would find petitioner's procedural and other objections meritorious and would leave the Board no alternative except a completely new proceeding from start to finish. We submit that neither assumption may be made.

The first assumption clearly is out of place; indeed, although indulged in by petitioner in opposing the Board's motion (R. 47–48), and again in its petition for certiorari, it appears to have been largely abandoned in petitioner's brief. Contrary to petitioner's unfounded allegations, the Board does not intend merely to go through the motions of further proceedings in an effort to "patch up its record" (R. 47). Actually, petitioner is being accorded the right to present to the Board any and all objections it may have both to the procedure of the Board and to the substantive merits of the case. The Board has stated that it will reconsider the entire case (R. 37, 104). Certainly the Court will not speculate as to the validity of the proceedings, nor will it assume that they will be irregular in any respect. *In re Petition of National Labor Relations Board, supra; Dalton Adding Mach. Co.* v. *Virginia,* 236 U. S. 699, 701; *Lehmann* v. *State Board of Public Accountancy,* 263 U. S. 394, 398.

Nor can petitioner validly assume that, had the case been decided in the Circuit Court of Appeals, the whole proceeding would be at an end. If the court had upheld petitioner's contention that it had been denied a fair hearing before the Board, it "would have been ground only for setting aside the order without inquiry into its merits." *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 443; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, 259. Probably the court would have reversed the order without prejudice to a new order. Cf. *Louisville & Nashville R. R. Co.* v. *Behlmer*, 175 U. S. 648, 676; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 29; *Interstate Commerce Commission* v. *Clyde Steamship Co.*, 181 U. S. 29, 33; *James S. Kirk & Co.* v. *Federal Trade Commission*, 59 F. (2d) 179, 181, 183 (C. C. A. 7th), certiorari denied, 287 U. S. 663; *Federal Trade Commission* v. *Mid West Mills*, 90 F. (2d) 723 (C. C. A. 7th). It might well have directed that the case stand for further hearing before the Board. Cf. *Atlanta, B. & C. Ry. Co.* v. *United States*, 28 F. (2d) 885 (N. D. Ga.), 158 I. C. C. 6, 37 F. (2d) 401 (N. D. Ga.), 282 U. S. 522, 201 I. C. C. 645, 12 F. Supp. 782 (N. D. Ga.), 296 U. S. 33; *Brotherhood of R. R. Trainmen* v. *National Mediation Board*, 88 F. (2d) 757, 761 (App. D. C.); *Southern Ry. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, 302. See *United States* v. *Griffin*, 303 U. S. 226, 228, 229.

But even if the court merely set aside the order, its action would not necessarily bar further proceedings before the Board or be *res judicata* of another order by the Board. Cf. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 55–6, 64; *United States* v. *Atlanta, B. & C. R. Co.,* 282 U. S. 522, 530. See also *Florida* v. *United States,* 282 U. S. 194, 186 I. C. C. 157, 190 I. C. C. 588, 4 F. Supp. 477 (N. D. Ga.), 292 U. S. 1; *United States* v. *Griffin,* 303 U. S. 226; *Baltimore & Ohio R. R. Co.* v. *United States,* 24 F. Supp. 734 (N. D. N. Y.), in all of which the contention of *res judicata* was unsuccessfully advanced. Thus the whole basis upon which the formal argument of petitioner is based falls to the ground. For the court to have denied the motion "would be to say that the courts are anxious to encourage litigation." *Thomson-Houston Electric Co.* v. *Holland,* 160 Fed. 768 (C. C. N. D. Ohio).

2. Petitioner, citing *Ex parte Skinner & Eddy Corp.,* 265 U. S. 86, 93–94, next contends (Br., pp. 27–37) that the Board may not dismiss its proceeding in the present case because, in the language of the opinion in that case, petitioner—

> is in a position to demand on the pleadings an opportunity to seek affirmative relief and he would be prejudiced by being remitted to a separate action.

That the general rule is qualified to that extent is unquestioned, but it is equally clear that upon the

facts of the present case the qualification has no application whatever.

Petitioner's assertion that it became entitled to affirmative relief is based upon its answer to the petition filed by the Board (R. 12)[7] in which it prayed (R. 21)—

> that the petition herein be denied and dismissed, and that the purported order of the Board be set aside and the proceeding remanded to the Board with direction to dismiss the complaint, and respondent prays for such other and further relief in the premises as may be just and proper.

No answer is required, or even provided for, under the Act. Assuming, however, that the answer was a proper pleading, it is very difficult to see wherein it seeks "affirmative relief." When the Board filed its petition for review, the court below was empowered to enforce the order of the Board, if it found in the Board's favor; to set it aside, if it found against the Board; or to grant enforcement to a portion of the order and deny it as to the

[7] Petitioner, properly, does not rely upon its own petition to have the order of the Board set aside. Its petition was not filed until five days after it had been served with notice of the Board's motion to withdraw, and two days after it had been filed in court. It could not, therefore, operate to defeat the motion already filed. Compare *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 94. A defendant may not defeat a dismissal by filing a cross-bill or counterclaim after the plaintiff has filed his motion to dismiss but before it has been acted on by the court. *Whittel* v. *Roche*, 88 F. (2d) 366, 367 (C. C. A. 9th); *Youtsey* v. *Hoffman*, 108 Fed. 699 (C. C. Ky.); *Tower* v. *Stimpson*, 175 Fed. 130 (C. C. Mass.); *Cowham* v. *McNider*, 261 Fed. 714 (E. D. Mich.).

rest, or modify it before granting enforcement. Section 10 (e), *infra*, pp. 62–64. The answer filed by petitioner did not change that situation in the least. The ultimate conclusions which the court might reach were neither diminished nor enlarged. The prayer in the answer, quoted above, does no more than ask for what petitioner would receive in any event if it were victorious in the Board's proceeding.

The situation, in other words, is the same as that which would exist in an ordinary lawsuit if a defendant were to file a motion to dismiss the bill instead of a general traverse, or if the defendant's answer prayed that the bill be dismissed. The defendant would, it is true, ask for a particular form of relief, but it is precisely the relief to which he would be entitled if he were successful in defending the action. Under such circumstances, it seems to be a plain misuse of the term "affirmative relief" to assert that a demand for a judgment for the defending party—and nothing more—bars a plaintiff from its right to a voluntary dismissal. *Aetna Life Ins. Co. of Hartford, Conn.* v. *Wilson*, 84 F. (2d) 330, 331 (C. C. A. 4th).

Petitioner devotes considerable space (Br., pp. 30–33) to an attempt to disprove this almost self-evident proposition. It cites no decisions which actually state a contrary doctrine but relies on a number of cases which are alleged to be inconsistent with the Board's contention. The cases, we submit, are entirely consistent with our position. In *City of Detroit* v. *Detroit City Ry. Co.*, 55 Fed.

569 (C. C. E. D. Mich.), referred to on p. 31 of petitioner's brief, plaintiff's request to be allowed to dismiss was denied, not because defendant had asked for the same relief as it would have had upon winning plaintiff's action, but because of serious prejudice which would result to the defendant by reason of delay, and because defendant asked for relief above and beyond that which it would have had if it had simply defeated plaintiff's action. See 55 Fed. at 575; *Sauter* v. *First National Bank*, 8 F. (2d) 121, 124 (C. C. A. 7th). Similarly, actual prejudice—loss of defenses or loss due to delay—formed the basis for the decisions in the lien cases cited by petitioner on p. 31 of its brief. *Stevens* v. *The Railroads*, 4 Fed. 97, 101–103 (C. C. W. D. Tenn.), aff'd, 114 U. S. 663; *Callahan* v. *Hicks*, 90 Fed. 539, 543 (C. C. W. D. Va.); *Sauter* v. *First National Bank*, 8 F. (2d) 121, 124 (C. C. A. 7th). And, in the patent cases cited by petitioners at p. 32, the voluntary dismissals were not allowed because defendants had asked for substantially more than that which they would have had by a successful defense in the plaintiffs' cases. *Electrical Accumulator Co.* v. *Brush Electric Co.*, 44 Fed. 602, 603, 605 (C. C. N. D. Ohio); *Hat-Sweat Mfg. Co.* v. *Waring*, 46 Fed. 87 (C. C. S. D. N. Y.); *Automotive Products Corp.* v. *Wolverine Bumper & Specialty Co.*, 15 F. (2d) 745, 747 (C. C. A. 6th), certiorari denied, 275 U. S. 565. In *In re Georgia Power Co.*, 89 F. (2d) 218 (C. C. A. 5th), the defendants had acquired a valuable right by success-

fully opposing a motion for an interlocutory injunction, and on that basis plaintiff's request for permission to dismiss voluntarily was refused. See 89 F. (2d) at p. 220. The unusual facts of this case clearly distinguish it.

Even if petitioner were able successfully to establish that the prayer of its answer was a prayer for "affirmative relief," there still remain two insuperable obstacles to the establishment of its position. In the first place, as petitioner itself recognizes (Br., pp. 29–30), the *Skinner & Eddy* case, *supra,* requires not only that a defendant be entitled to affirmative relief, but also that, having expended time and effort in preparing his counter case, he would be prejudiced by being remitted to another proceeding. Unless there be actual prejudice, a prayer for affirmative relief is immaterial. *City of Detroit* v. *Detroit City Ry. Co.,* 55 Fed. 569, 575 (C. C. E. D. Mich.); *Harding* v. *Corn Products Refining Co.,* 168 Fed. 658 (C. C. A. 7th), certiorari denied, 214 U. S. 515; *Aetna Life Ins. Co. of Hartford, Conn.* v. *Wilson,* 84 F. (2d) 330, 331 (C. C. A. 4th); *Whittel* v. *Roche,* 88 F. (2d) 366, 371 (C. C. A. 9th).

It is highly significant that at no time heretofore has petitioner even so much as suggested that it had been put to any trouble in the preparation of its "affirmative" case. Its memorandum in the court below in opposition to the motion of the Board for leave to withdraw its case (R. 41–50), even in that part of it addressed to the discretion of the court, contains no suggestion that the mo-

tion should be denied upon this ground. The same is true of its motion to vacate the order permitting the Board to withdraw (R. 56). Its petition for certiorari contains no reference to the matter, nor does its Brief in Reply to the Brief in Opposition to the writ of certiorari, in which the deficiencies in petitioner's case were clearly pointed out (p. 11).

Even assuming, however, that petitioner may, as an afterthought, challenge a discretionary act of the court below (see pp. 30–31, *infra*) upon a basis not suggested to that court, we submit that petitioner can make no showing which is adequate to meet the requirement of actual prejudice stated in the *Skinner & Eddy* and other cases cited above. Some of the activity detailed on p. 30 of petitioner's brief is plainly related to the proceeding before the Board, rather than to the proceeding in the Circuit Court of Appeals. Others of its actions were the preparation of interrogatories which were ordered stricken from the record (R. 108). Certainly the showing must be confined to proper activity in the preparation of a case. The remaining activities were simply the ordinary preparation of pleadings, which were obviously patterned largely upon the petition for rehearing and papers already filed with the Board. Certainly the preparation of an answer, for example, cannot constitute actual prejudice, else prejudice would exist in every case. Cf. *Erie R. Co.* v. *Boston, C. C. & N. Y. Canal Co.*, 270 Fed.

876 (Mass.). Nor is the matter dependent, as petitioner seems to believe, on "what more petitioner could have done in order to bring itself within the language of" the *Skinner & Eddy* case (Br., p. 30). The critical question is not whether the petitioner has made every attempt possible to put itself in a position to be prejudiced, but rather whether it has been prejudiced in fact. We believe that, even if the facts set out on p. 30 of its brief be considered, it has not been so prejudiced.

3. We believe, therefore, that petitioner's claims of prejudice are completely without foundation. But we need not rest there. The motion for leave to dismiss was plainly one that the court below could grant or deny in its discretion. *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 146; *City of Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569, 573 (C. C. E. D. Mich.); *Penn Phonograph Co.* v. *Columbia Phonograph Co.*, 132 Fed. 808, 810 (C. C. A. 3d); *United Motors Service* v. *Tropic-Aire*, 57 F. (2d) 479, 488 (C. C. A. 8th); *Pilot Life Ins. Co.* v. *Habis*, 90 F. (2d) 842, 843, 844 (C. C. A. 4th); *Dooley Improvement's Inc.* v. *Motor Improvement's Inc.*, 6 F. Supp. 161, 163 (Del.). Similar power exists to permit appellants, including the United States, to discontinue an appeal over the objection of the appellee. *Latham's & Deming's Appeal*, 9 Wall. 145; *United States* v. *The Minnesota & N. W. R. Co.*, 18 How. 241; *United States* v. *Young*, 94 U. S. 258; *United States* v. *Griffith*, 141 U. S. 212; *United States* v. *Belcher*, 294 U. S. 736.

Although petitioner urged, in opposition to the Board's motion for leave to dismiss, that as a matter of discretion the court below should not allow the voluntary dismissal (R. 45–48), it does not now claim that the court abused its discretion in granting the Board's motion. Indeed, since petitioner did not raise the question in its petition for certiorari, this Court is not called upon to consider the question. *Gunning* v. *Cooley*, 281 U. S. 90, 98; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182.

But even were the question an open one, no showing of abuse of discretion could be made. No showing is made, either in the record or in petitioner's brief, of the actual facts with respect to either time or money spent in the activities which it relates. Nothing appears which even in remote degree corresponds to the usual case in which a dismissal has been refused because the defendant would be prejudiced by activity in the presentation of its case. Compare *Western Union Tel. Co.* v. *American Bell Tel. Co.*, 69 Fed. 666 (C. C. A. 1st), certiorari denied, 166 U. S. 721. In many cases in which the defendant could properly assert that he had expended much more time and energy than petitioner has, the plaintiff nevertheless has been allowed to dismiss his action. For example, dismissals have been allowed after defendant had filed testimony, taken depositions, or secured answers to interrogatories. *Connecticut & P. R. R. Co.* v. *Hendee*, 27 Fed. 672 (C. C. Vt.); *Young* v.

J. Samuels & Bro., 232 Fed. 784 (R. I.); *Whitall-Tatum* v. *Corning Glass Works*, 11 F. Supp. 338 (W. D. N. Y.); *Elliott Addressing Machine Co.* v. *New England Tel. & Tel. Co.*, 20 F. Supp. 278 (Mass.). The same result has been reached even after the evidence has been completed. *Pennsylvania Globe Gaslight Co.* v. *Globe Gaslight Co.*, 121 Fed. 1015 (C. C. Mass.); *Morton Trust Co.* v. *Keith*, 150 Fed. 606 (C. C. Mass.). Cf. *E. G. Staude Mfg. Co.* v. *Labombarde*, 229 Fed. 1004 (N. H.), modified, 243 Fed. 962 (C. C. A. 1st). And dismissals have been allowed after the defendant has won the denial of a preliminary injunction, *Penn Phonograph Co.* v. *Columbia Phonograph Co.*, 132 Fed. 806 (C. C. A. 3d); *Orr* v. *Coca-Cola Co.*, 247 Fed. 452 (C. C. A. 9th), even where the defendant had been forced to take an appeal in order to have the appellate court reverse an order granting the preliminary injunction. *Thomson-Houston Electric Co.* v. *Holland*, 160 Fed. 768 (C. C. N. D. Ohio).

Finally the policy of avoiding needless litigation, which was invoked by the Board in support of its motion, and which has been stated and elaborated above, clearly support the conclusion of the court. The question was fully presented, and the determination of the court below, no abuse of discretion having been shown, will be accepted.[1]

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[1] The same answer is applicable to petitioner's further contention that it will be prejudiced in its relation with third persons. The contention was not presented to the court

C. THE PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT DO NOT REQUIRE A CONTRARY CONCLUSION

Petitioner's final contention is based upon its construction of Section 10 (e) of the Act, *infra*, pp. 62–64, which it construes as requiring a Circuit Court of Appeals to proceed to a decree affirming, modifying, or setting aside the order once its jurisdiction attaches.

The Act, of course, does not so state. Section 10 (e) says only that a court "shall have power" to enter a decree, not that it *must* do so. It has been pointed out in the Brief in Opposition to the petition for certiorari (p. 12) that the contention leads to the absurd conclusion that the court *must* proceed to a conclusion in a case even though *neither* party so desired. Yet no attempt is made in petitioner's brief to explain why such a construction of the statute should be adopted. Joint petitions to dismiss petitions for enforcement under the analogous Federal Trade Commission Act have been granted. *E. g.*, *Federal Trade Commission* v.

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below, and should not now be considered as a valid objection to the exercise of the discretion by the lower court. See *Duplex Printing Press Co.* v. *Campbell Printing-Press Co.*, 69 Fed. 250, 252 (C. C. A. 6th). It is, moreover, entirely speculative unlike the patent cases relied on by petition (Br., pp. 35–36). Finally, the fact that even in criminal cases the Government may voluntarily discontinue a prosecution, notwithstanding the contention of the defendant that he should be absolved, indicates that the consideration to which petitioner adverts is not a particularly weighty one. See *United States* v. *Brooks*, 44 Fed. 949 (N. D. Wash); *United States* v. *Harned*, 44 Fed. 751 (N. D. Wash.).

Evans Fur Co. and Kent Fur Co., January 4, 1937 (C. C. A. 2d); *Federal Trade Commission* v. *George H. Lee Co.*, April 10, 1935 (C. C. A. 8th); *Federal Trade Commission* v. *L. A. Crancer & G. B. Fleischman*, March 20, 1935 (C. C. A. 8th). The concept of a judicial juggernaut which, once started, cannot be stopped by either party or by both together is so contrary to all reason that it would certainly require the clearest language to justify such a result.

Indeed, petitioner's whole argument on the statute seems to confuse the presence of jurisdiction with its exercise. Its long discussion of the provision that jurisdiction of the proceeding is in the Board "until" a record is filed in the Circuit Court of Appeals, when the jurisdiction of the Board ceases and that of the court becomes exclusive (Br., pp. 17–21) can have no relevance whatever unless one assumes that the court, once having acquired jurisdiction, cannot allow the proceeding to be dismissed. There is no doubt that jurisdiction attached in the court below in this case, but the existence of jurisdiction does no more to prevent a voluntary dismissal in a proceeding to review an order of the Board than it does in every other case in which a proceeding is dismissed after it is within the jurisdiction of a court.

Petitioner attempts (Br., pp. 23–27) to develop alleged reasons of policy in favor of its interpretation of Section 10 (e) and against that adopted by

the court below. The reasons it suggests are wholly out of place. This Court will not accept an argument which impugns the good faith of an administrative agency by suggesting that the valid and proper reasons advanced by the Board in its motion for leave to withdraw after the decision of this Court in the *Morgan* case (R. 36-38) were simply a cloak for other and improper ones. Legally, of course, petitioner's reference to the reasons for the voluntary dismissal of a case are totally irrelevant. *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 93; *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 20; *Harding* v. *Corn Products Refining Co.*, 168 Fed. 658, 665 (C. C. A. 7th), certiorari denied, 214 U. S. 515; *Prudential Insurance Co. of America* v. *Stack*, 60 F. (2d) 830, 832 (C. C. A. 4th). See also *United States* v. *Griffith*, 141 U. S. 212. But we need not rely upon that. The Board has at all times fully informed the court as to its reasons—reasons based simply upon a desire to eliminate, so far as possible, the necessity of a long litigation on issues not going to the merits, and to afford petitioner further opportunities before the Board. Petitioner, it seems, might well have welcomed, rather than criticised, the Board's expressed desire to accord to petitioner precisely that which it so strenuously desired before the Board's motion was filed.

Equally questionable is petitioner's attempt to

conjure up hypothetical abuses which might be committed by the Board. Again, the argument is legally without relevance, since the Court will not speculate as to the validity of the further proceedings to be had before the Board, nor will it assume that they will be irregular in any respect. *In re Petition of National Labor Relations Board, supra; Dalton Adding Machine Co.* v. *Virginia*, 236 U. S. 699, 701; *Lehmann* v. *State Board of Public Accountancy*, 263 U. S. 394, 398. Again, however, it is unnecessary to rely upon that principle. Petitioner's suggestions have not the slightest foundation in fact. No scintilla of evidence is referred to that justifies the assumption that any one of the situations created by petitioner's imagination is possible, much less likely. An argument built upon such completely groundless hypotheses does not merit even serious consideration.

We submit, therefore, that the order of May 5, 1938, allowing the Board voluntarily to dismiss its petition for enforcement of its order, was correct, and should be affirmed.

II

No. 183

THE COURT BELOW WAS WITHOUT JURISDICTION OF THE CAUSE IN PETITIONER'S CASE, AND ITS ORDER REMANDING THE CAUSE TO THE BOARD SHOULD BE REVERSED UPON THAT GROUND

The order of the court below under review in this case (No. 183, No. 8019 below) is the order of June

10, 1938 (R. 106), remanding the cause to the Board for the purpose of setting aside the Board's order and taking further proceedings. In Point III, *infra*, we shall show that if the court below had jurisdiction to make the order, it was valid and should be affirmed. In the present point, we will urge that the court was without jurisdiction to make the order, and that it should therefore be reversed, and the case remanded to the court below with directions to dismiss the petition for lack of jurisdiction.

The question of jurisdiction was directly raised in the court below by the motion of the Board of June 2, 1938 (R. 85–89) to vacate the order of May 9, 1938 (R. 80), in which the court below ordered that the transcript of record which had been filed in the Board's case be deemed to have been filed in petitioner's case as of May 4, 1938. The Board sought to have the cause remanded only in the event that its motion to vacate was denied (R. 105). The question was also raised in the Board's Brief in Opposition to the petition for certiorari, pp. 13–14. As we there stated (p. 14), the Board did not file a cross-petition for certiorari because the granting of its motion to remand had the same practical result as the granting of its motion to vacate would have had—it permitted the Board to set aside its order and take further proceedings. In any event, the question being one of compliance with specific statutory jurisdictional provisions, the Board could

not waive the issue, and necessarily it is before the Court. *United States* v. *Corrick*, 298 U. S. 435, 440; *United States* v. *Griffin*, 303 U. S. 226, 229.

There are several jurisdictional requirements contained in Section 10 (f), *infra*, p. 64, which were not met in petitioner's case and which make it impossible for the court below to enter its order of May 9, 1938. The first of these prerequisites is that which requires that a petition for review be filed by a "person aggrieved" by the order of the Board. The circumstances under which petitioner's petition for review was filed show clearly that petitioner cannot be so described.

Petitioner's petition for rehearing before the Board, and its answer to the Board's petition for enforcement, complained of the absence of a trial examiner's report and an oral argument and prayed that the order of the Board be set aside (R. 9, 21). Thereafter the Board announced, by its notice to petitioner, that it would move to dismiss its own proceeding, that it would voluntarily grant that which petitioner sought—the setting aside of the order, and that it would have the further proceedings which petitioner contended should have been held, and by which other errors of which petitioner complained would be corrected if found to be meritorious.

Petitioner's petition for review, filed on May 4, 1938 (R. 62), five days after it had been served with

notice of the Board's motion for leave to withdraw (R. 35), was, therefore, only a tactical maneuver by which petitioner hoped to defeat or delay the action of the Board in granting to petitioner that which it had previously asked for. Obviously, it did not represent the act of a "person aggrieved" by the order. Congress intended that petitions for review should be used to contest alleged denials of substantial rights. It did not intend them to be used for simply tactical purposes. The decision in *In re Petition of National Labor Relations Board, supra,* is directly in point. The Court there stated:

> Counsel insist that Republic is aggrieved, within the meaning of subsection (f), by the Board's attempt to retain jurisdiction of the proceeding and take further steps in it. But the Act grants a review and relief only to a person aggrieved by an order of the Board and had the court not restrained the Board its order would have been vacated and there now would be no order outstanding.

Similarly, here, if the court had not entertained the petition for review, and made its order of May 9, the Board's order would have been set aside pursuant to its notice of May 6, unless petitioner itself had shown good cause to the contrary (R. 54).

Apart from the fact that petitioner was not aggrieved within the meaning of the Act, there is a second jurisdictional requirement which has not been met. Under the specific requirements of Sec-

tion 10 (f) jurisdiction does not attach upon a petition for review until, after the petition has been filed in court and a copy thereof served on the Board, "the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board," and the court shall cause notice thereof to be served on the Board. These last requirements were not fulfilled.

We may agree with petitioner (Br., pp. 76–81) that Section 10 (f) should not be interpreted to require a duplication of physical transcripts when one is already on file pursuant to a petition to enforce or review the same order of the Board.* But under Section 10 (f), even if a transcript is already on file, more than the mere filing of a petition to review is required to vest the court with jurisdiction. See *In re Petition of National Labor Relations Board, supra.* The section contemplates at least an order consolidating the cases, or deeming the transcript on file in the first case filed in the second. Petitioner's motions for such orders (R. 38, 77) were a recognition of this necessity, as was its statement to the court (R. 50):

> The Act further requires, however, that upon the filing of such a petition a transcript of the entire record before the Board be filed.

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* The device of intervention in the Circuit Court of Appeals would serve to eliminate any questions with respect to duplicate records. Cf. *National Labor Relations Board v. Remington Rand, Inc., and Central Executive Council*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, Nos. 970, 1058, May 23, 31, 1938.

> This transcript must be certified by the Board. Such certified transcript is now on file in this court. The respondent as petitioner in its own suit has asked that it be deemed filed in that case.

The order deeming the record filed was not, however, granted until May 9, 1938 (R. 80). At that time, we submit, the court was without jurisdiction to make any such order. On May 5, 1938, the Board had received a copy of the court's order (R. 51), signed and sealed by the clerk of the court, granting the Board's motion for leave to withdraw its petition for enforcement and the certified copy of the record (R. 51). On May 6, 1938, the Board, pursuant to the leave thus granted, had reasserted its own jurisdiction, and served petitioner with a notice of further proceedings before it (R. 54). The jurisdiction of the court came to an end at that point. The order of May 5, followed by the Board's action of May 6, like the dismissal of an appeal, "ended the case in that court, and deprived it of all power to add to or alter the record as certified." *Realty Acceptance Corp. v. Montgomery*, 284 U. S. 547, 552.

This Court has specifically held that once a court has divested itself of jurisdiction, and, pursuant thereto, jurisdiction has vested in and been exercised by a lower or other court, the first court cannot, by a reconsideration of its decision, revest jurisdiction in itself. In *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, the Court of Claims had granted a plaintiff's motion to dismiss its suit. The plain-

tiff thereupon filed a new suit involving the same claim in a district court in Washington. Thereafter, upon motion of the United States, the Court of Claims vacated its order of dismissal, and granted leave to the United States to file a counterclaim. This Court, pointing out that under Section 154 of the Judicial Code, no suit could be maintained in the Court of Claims if a similar suit was pending in another court, reversed the order, stating (265 U. S. at p. 95):

> The jurisdiction of these claims by the Court of Claims having been parted with by the order of dismissal in April can not be resumed by a retroactive order of the subsequent November, in view of the restrictive provision of § 154, which, by reason of the Washington suit, intervene and apply. * * *

The decision is precisely applicable to the present situation, and is, we submit, conclusive.

Further authority upon the question is contained in the opinions relating to attempts by federal District Courts to vacate orders remanding cases to a state court. The decisions uniformly hold that once the cause has been remanded and the state court has had further proceedings pursuant to the remand, as the Board did by its notice of May 6, the federal court is powerless to vacate its former order. *Ausbrooks* v. *Western Union Telegraph Co.*, 282 Fed. 733 (M. D. Tenn.); *Empire Mining Co.* v. *Propeller Tow-Boat Co.*, 59 S. C. 549, s. c., 108 Fed. 900 (C. C. S. C.); cf. *Traveller's Protec-*

tive Ass'n v. *Smith*, 71 F. (2d) 511, 513 (C. C. A. 4th).

Petitioner is not helped by the statement in the order of May 9 that the record in the Board's case was to be deemed to have been filed in petitioner's case "as of the time of the filing * * * by petitioner of its petition to review" (R. 80). The provision may have been inadvertent (see R. 88), but, in any event, it does not touch the question whether the court had power on May 9 to make any order at all. Certainly the court could not, by a retroactive order, divest the Board of the jurisdiction which it had regained and exercised pursuant to the order of May 5. *Ex parte Skinner & Eddy Corp., supra.*

Nor can petitioner avoid this conclusion by contending that the court acquired jurisdiction on May 4 apart from the order of May 9. The argument is that the order of May 9 "was merely confirmatory of the legal effect of the filing of the petition" (Br., p. 78). We have shown above, pp. 39–40, that Section 10 (f) requires more than the mere filing of a petition to give the court jurisdiction, as this Court has held and as petitioner itself has previously admitted. The general provisions in the Judicial Code with respect to the use of one record in related appeals to this Court and to the Circuit Courts of Appeals (U. S. C., Title 28, Sec. 864) upon which petitioner relies (Br., pp. 79–81) certainly cannot control the specific provision of the Act to the contrary.

There is also a third jurisdictional prerequisite which is lacking, which defeats the jurisdiction of the court even if the order of May 9 did effect a filing in petitioner's case of the record then in the court below. Section 10 (e) and (f) specifically require that the transcript of record which must be filed in order to vest jurisdiction in the Court be a transcript of the "entire" record. In view of the notice of May 6, 1938, the record which had theretofore been filed in the Board's case was no longer the "entire" record—it did not, in the language of this Court, exhibit "the Board's final action." *In re Petition of National Labor Relations Board, supra.* Consequently, no matter what effect be given to the attempt by the petitioner and the court below to effect a transfer of the record then in the court from the Board's case to petitioner's case, the attempt was of necessity completely ineffective.

We submit, therefore, that the court never had jurisdiction of petitioner's case, and that, accordingly, the court's order of June 10, remanding the case to the Board, should be reversed with instructions to dismiss the petition for review for lack of jurisdiction.[10]

[10] In the event that the Court is of opinion that the court below did not have jurisdiction, but that the point cannot be urged in this Court by the Board as a ground of a reversal of the order of June 10, the Court should affirm the order on the ground that it reached the correct result, without passing on the questions raised in Point III, *infra*. *Arthur C. Harvey & Co.* v. *Malley*, 288 U. S. 415.

III

No. 183

IF THE COURT BELOW HAD JURISDICTION, IT PROPERLY REMANDED THE CASE TO THE BOARD

If the court below had acquired jurisdiction of the cause by reason of petitioner's petition for review, its decision was correct, and its order entered on June 10, 1938 (R. 108), remanding the case to the Board for the purpose of setting aside its findings and order and having further proceedings, should be affirmed.

Petitioner's first objection to the order is that the Circuit Court of Appeals had no power to make it. The objection is in the alternative: that there is no power in a Circuit Court of Appeals to remand a cause to an administrative tribunal; and that if there be such a power, it does not exist in the present case, because it would be inconsistent with the provisions of Section 10 of the Act. Petitioner's second objection to the order, which seems to confuse with, or condition the existence of, the *power* to remand with the *mode of exercise* of that power, is that the court below had no power to remand the case without first deciding it. The two questions are much more conveniently treated separately. Accordingly, we shall show (A) that the court below clearly possessed the power to order the remand to the Board, and (B) that the power was properly exercised in the present case.

A. THE CIRCUIT COURT OF APPEALS HAD THE POWER TO REMAND THE CASE TO THE BOARD FOR FURTHER PROCEEDINGS THERE

The existence of an inherent power in the Circuit Court of Appeals to remand a cause pending before it to the Board is amply confirmed by many cases. Decisions under the Federal Trade Commission Act, which is very similar to the National Labor Relations Act with respect to judicial review of administrative orders,[11] are directly in point. In many cases arising under that Act this Court and the Circuit Courts of Appeals have recognized or exercised their power to remand actions to the Commission for further proceedings. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 580, 583; *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, 297; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 218; *Procter & Gamble Co.* v. *Federal Trade Commission*, 11 F. (2d) 47 (C. C. A. 6th), certiorari denied, 273 U. S. 717, 718; *Ohio Leather Co.* v.

[11] Section 5 of the Federal Trade Commission Act, like Section 10 (e) of the National Labor Relations Act, provides that upon the filing by the Commission of a petition to enforce its order, together with a transcript of the record, the court "shall have power to make and enter * * * a decree affirming, modifying, or setting aside the order of the commission." Act of September 26, 1914, c. 311, 38 Stat. 719, U. S. C., Title 15, Sec. 45. Each Act also contains a provision under which the court, upon application by either party, may order additional evidence to be taken before the administrative tribunal. Neither Act contains any specific provision for remand.

Federal Trade Commission, 45 F. (2d) 39 (C. C. A. 6th); cf. *Federal Trade Commission* v. *Balme*, 23 F. (2d) 615, 621, 622 (C. C. A. 2d), certiorari denied, 277 U. S. 598. See also *Brotherhood of R. R. Trainmen* v. *National Mediation Board*, 88 F. (2d) 757, 761 (App. D. C.).

The same inherent power to remand has long been recognized with respect to the review of orders of the Interstate Commerce Commission. Although the Commerce Act contains no provision for remand, this Court stated in *Texas & Pac. Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, 239, that if—

> the Commission has failed in its proceedings to give notice to the alleged offender, or has unduly restricted its inquiries upon a mistaken view of the law, the court * * * should either inquire into the facts on its own account, or send the case back to the Commission to be lawfully proceeded in.

See also 162 U. S. at p. 238; *Southern Ry. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, 302. And in several cases in the Circuit Courts of Appeals this power to remand has been exercised under the National Labor Relations Act itself. *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146, 155 (C. C. A. 5th); *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 91 F. (2d) 509 (C. C. A. 5th); *Mooresville Cotton Mills* v. *National Labor Relations Board*, 97 F. (2d) 959, 964 (C. C. A. 4th);

North Whittier Heights Citrus Ass'n v. *National Labor Relations Board*, 97 F. (2d) 1010 (C. C. A. 9th), pending on petition for writ of certiorari, No. 340, present Term. Indeed petitioner's own view on this question apparently has only recently changed, since in its answer in the court below it specifically requested that "the proceeding [be] remanded to the Board with directions * * *" (R. 21).

These cases are also a complete answer to petitioner's totally unsupported contention that in the absence of express statutory authorization a proceeding may not properly be remanded to an administrative tribunal (Br., pp. 46–48). It seems wholly unnecessary to quibble with petitioner on whether, under the explanation of the word "remand" contained in *Federal Radio Commission* v. *Nelson Bros. Bond & Mtge. Co.*, 289 U. S. 266, 278, the numerous decisions cited above have misused the term in directing that a case be returned to an administrative board or commission for further proceedings. At least, the word is commonly so used, its meaning is plain, and, as the cases show, the power of the courts to take that action when dealing with orders of administrative tribunals, whatever it may be called, is too well settled even to be open to question.

Petitioner also urges (Br., pp. 40, 42, 57) that even if there is an inherent power to remand a case to an administrative tribunal, it is inconsistent with the intention of Congress with respect to the judi-

cial review of orders of the Board as set out in Section 10. As proof of the alleged Congressional intent, petitioner refers to the provisions of Section 10 (d) and (e), *infra*, pp. 62–64, terminating the jurisdiction of the Board and giving the Circuit Court of Appeals exclusive jurisdiction of the case upon the filing of a transcript of the record; the provision of Section 10 (f), *infra*, p. 64, conferring upon a "person aggrieved" a right to obtain judicial review of an order; and that part of Section 10 (e) which allows the court to order the taking of additional testimony upon request of either party (Br., pp. 42, 57).

We fail to see in these provisions any evidence of a Congressional intent to negative the existence of an inherent power to remand which would otherwise exist. Subsections (d), (e) and (f) are in no degree inconsistent unless one first assumes that which petitioner is trying to prove—that the court, once having assumed jurisdiction, *must* proceed to a decision. That argument, as we have shown above, pp. 32–35, is plainly without merit. Nor do the provisions of Section 10 (e) with respect to the taking of additional testimony evince a contrary intent. The provision simply provides a means by which Congress hoped to facilitate final decisions by the court, and is in no way inconsistent with the continued existence of other powers in the courts which may also help to achieve that end, and which would not be dependent upon an appli-

cation to the court by a party as would be necessary under Section 10 (e). It is much more reasonable to assume that had Congress intended that the inherent power to remand should not exist in proceedings of this sort, it would have expressly negatived it, which, admittedly, it did not do. *United States* v. *Louisville & Nashville R. Co.*, 236 U. S. 318, 336; *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208, 231.

The complete answer to the contention, however, is supplied by the Federal Trade Commission cases cited above, pp. 45–46. Section 5 of that Act, in providing for judicial review of orders of the Commission, contains provisions for vesting jurisdiction in the courts upon the filing of a transcript, and for further hearings upon the application of either party, nearly identical with those in Section 10 of the National Labor Relations Act (see footnote 11, p. 45, *supra*). Yet in none of the cases arising under that Act in which the Court has remanded cases to the Commission has it even been intimated that the inherent power of a court to remand a proceeding to the Federal Trade Commission conflicted with the provisions of the statute.

We submit, therefore, that in a proceeding to review an order of the National Labor Relations Board there can be no doubt that the Circuit Courts of Appeals have an inherent power to remand the cause to the Board for further proceedings.

B. THE POWER TO REMAND WAS PROPERLY EXERCISED IN THE PRESENT CASE

Petitioner also contends (Br., pp. 46, *et seq.*) that even if the court below had the power to send the case back to the Board, the manner in which the power was exercised was improper. The argument is that the Circuit Court of Appeals should have set aside the order of the Board before the remand. Such a contention, we submit, is both pointless and without merit. So far as petitioner is concerned, whether the order was set aside by the court upon the remand is of no consequence whatever. In any event, the court's action was entirely proper.

1. *Whether or not the order was set aside before the remand is of no consequence*

Petitioner devotes a surprising amount of space (Br., pp. 46–74) to its argument that if the court had the power to remand the case, it should have first set aside the Board's order. It is plain that, at best, the argument relates simply to a question of procedural technique which could be decided either way without any practical consequences whatever. In essence, the argument is that the court should have set aside the order, rather than remanding it so that the Board could set it aside. In either case, however, the order is set aside, which is what petitioner wishes. If, as provided by the order of the court below, the cause is remanded and the order then set aside by the Board, there is, of course, no

bar to further proceedings which might eventually result in the entry of a new order. But if the order had been set aside by the court, there would likewise have been no obstacle to further proceedings by the Board. See cases cited at pp. 22–23, *supra*.

This is certainly true if petitioner is contending that there should have been a formal order of reversal—that is, one not based on any consideration of the questions raised by petitioner's petition. It is equally true, however, of the contention that the court should have decided all of the procedural questions raised by petitioner and remanded the case only if it found that petitioner's contentions were valid. The fact which cannot be avoided is that the order will be set aside by the Board—and petitioner could have achieved no more if the procedural issues had been decided and it had been successful. Nor are any defenses which it now has, and which it may wish to raise if and when a new order is entered, lost to it or prejudiced in any way. And, in the meantime, the objective which it had sought to achieve by its petition to review—that the order be set aside—is completely accomplished.

2. *In any event, the court below, in its discretion, could remand the case to the Board without setting aside the order*

Even assuming, however, that it were of practical consequence that the court below did not set aside the Board's order, we submit that the court was clearly empowered, in its discretion, to exercise its

power to remand the case to the Board without first setting aside the order, either formally, or for error found.

It has never been held that a Circuit Court of Appeals, in remanding a case to an administrative tribunal whose orders are not self-enforcing, must first either enter a formal reversal of the order of that tribunal or else determine the validity of the order and set it aside if it is found to be invalid for any reason. On the contrary, the action of the court below is in accord with the dispositions made *sua sponte* by the Circuit Courts of Appeals for the Fourth and Fifth Circuits in *Mooresville Cotton Mills* v. *National Labor Relations Board*, 97 F. (2d) 959, 964 (C. C. A. 4th), and *Aguilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146, 155 (C. C. A. 5th), and *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 91 F. (2d) 509 (C. C. A. 5th), respectively, as well as with that made by the Circuit Court of Appeals for the Ninth Circuit upon the Board's motion in *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 97 F. (2d) 1010, pending on petition for certiorari, No. 340, present Term.[13]

[13] Although in the *Mooresville* case the Circuit Court of Appeals previously had issued a decree modifying the Board's order and enforcing it as modified (94 F. (2d) 61). But this decree was set aside and annulled by the court on April 4, 1938, in granting the Board's petition for rehearing. Consequently, on July 13, 1938, when the court, pursuant to its decision reported in 97 F. (2d) 959, ordered that the "case be remanded" to permit the Board to determine the question of substantially equivalent employment, the Board's order stood undisturbed.

In addition, there are several situations in which the Federal courts, including this Court, have remanded cases without reversing the decree or order below and without deciding the issues. Perhaps the closest analogy to the instant case is where the appellate court, without disturbing the decree of the lower court, grants the request of the lower court to return the record so that further proceedings or a rehearing may be had below. *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902 (C. C. A. 2d), reversed on other grounds, 274 U. S. 316; *Cimiotti Unhairing Co.* v. *American Unhairing Mach. Co.*, 99 Fed. 1003 (C. C. A. 2d), on rehearing below, 108 Fed. 82 (C. C. S. D. N. Y.); *Sundh Electric Co.* v. *General Electric Co.*, 244 Fed. 163, 171 (C. C. A. 2d), certiorari denied, 245 U. S. 661. This Court has indicated that such action is entirely proper provided the term of the lower court had not expired.[18] *Roemer* v. *Simon*, 91 U. S. 149; *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547. See also *Hall* v. *United States*, 78 F. (2d) 168, 170 (C. C. A. 10th). Even without such an application by the lower court, an appellate court may remand to the lower court for further proceedings yet not reverse the appealed order or judgment. *Ballard* v. *Searls*, 130 U. S. 50; *Malleable Iron Range Co.* v. *United States*, 273 U. S.

[18] If the term of the lower court had expired, a formal reversal would have been necessary, prior to the recent adoption of the Rules of Civil Procedure for the District Courts of the United States (Rule 6 (c)), to allow the lower court to take further action in the cause. (See pp. 57–59, *infra*.)

674. See also *Jensen* v. *New York Life Ins. Co.*, 50 F. (2d) 512 (C. C. A. 8th), certiorari denied, 287 U. S. 626.

The application of a special master for a withdrawal and return of his report after filing, so that he might reconsider it, presents another close analogy to the motion of the Board, as this Court has suggested. *In re Petition of National Labor Relations Board, supra.* As in the present case, no purpose would be served by a setting aside, and plainly the court may grant the master's application without setting aside his report. *National Folding-Box & Paper Co.* v. *Dayton Paper-Novelty Co.*, 91 Fed. 822 (C. C. S. D. Ohio). The same is true where the court grants a motion by one of the parties to recommit the report for further proceedings (*Westlake* v. *Marrin*, 176 Fed. 742 (C. C. E. D. Pa.); *Ball Engineering Co.* v. *J. G. White, Inc.*, 283 Fed. 496 (Conn.)), or where the court recommits the report *sua sponte*. *Missouri Pac. R. Co.* v. *Texas & P. Ry. Co.*, 33 Fed. 359 (C. C. E. D. La.); *Kansas Loan & Trust Co.* v. *Electric Ry., Light & Power Co.*, 108 Fed. 702 (C. C. W. D. Mo.).

The remands in these cases were not to administrative tribunals, but no reason appears why the inherent powers which courts possess in these situations may not be exercised equally well when orders of administrative tribunals are in question. Cf. *Podlesak* v. *McInnerney*, 26 App. D. C. 399. In fact the contrary is true. Simple, effective, and

rapid court review of orders of administrative tribunals depends in large part in allowing courts to exercise familiar procedural judicial powers which serve to expedite or avoid litigation and which are not repugnant to the statutory scheme.

Petitioner contends (Br., pp. 58–69) that we state the principles of these decisions too broadly. The objection is based upon a misapprehension. We do not contend, as petitioner seems to assume, that the cases cited are directly in point; we submit, rather, that they disprove petitioner's flat statement that a court can *never* remand a case without first setting aside the order of the court or the administrative tribunal (Br. pp. 48–49), and that they are analogies which, while still analogies, indicate that the courts are able to take such action as will facilitate the prompt and effective discharge of their functions and at the same time will avoid useless litigation on questions which are no longer in issue.

Petitioner also misapprehends the nature of the power which was exercised. The power is not, as petitioner states (Br., p. 55), a power in the *Board* "to halt the processes of judicial review whenever it decides that it would like to take further proceedings in the case." The power is clearly in the *court*, and is, of course, discretionary. All that we assert is that the court *may* remand a proceeding to the Board without first setting aside its order if it believes that in that way it can expedite the

proceedings and avoid the decision of questions which it may not be necessary for it to decide.

The same misapprehension has led petitioner to again conjure up a series of hypothetical cases in which it asserts that the power would lead to abuses by the Board. Plainly, however, the Board is subject to the discretion of the court, and it cannot be assumed that that discretion will be improvidently exercised.

Certainly there is no compulsion on a court, before remanding, to decide the issues on the record presented. Indeed, this Court has declared that it is "not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *California* v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308, at 314; *United States and Interstate Commerce Commission* v. *Alaska Steamship Co.*, 253 U. S. 113, 116. The Court's established practice where all the issues are moot is to reverse the decree without determining whether it was valid, even though full argument and consideration have been had, only so that it would not be left in force, and to remand the cause with directions to dismiss the bill. *United States* v. *Anchor Coal Co.*, 279 U. S. 812, and cases collected at p. 813.

Many other instances may be listed in which this Court in the exercise of its appellate jurisdiction

has declined to decide the issues but has entered purely formal reversals and has remanded the causes for further proceedings. Such disposition has been made where the record was insufficient (*Estho* v. *Lear*, 7 Pet. 130; *Levy* v. *Arredondo*, 12 Pet. 218; *Villa* v. *Van Schaick*, 299 U. S. 152) or the evidence inadequate (*United States* v. *Rio Grande Dam and Irrigation Co.*, 184 U. S. 416); where a wrong rule of law was applied below (*Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 202); and where further findings were desired (*Lincoln Gas and Electric Light Co.* v. *City of Lincoln*, 223 U. S. 349) or where the findings were required to be in the form prescribed by the applicable equity rule. *Interstate Circuit, Inc.* v. *United States*, 304 U. S. 55. In one case the Court, without determining the issues, reversed the judgment and remanded the cause to permit the state court to reconsider its action in the light of a supervening decision by this Court. *Patterson* v. *Alabama*, 294 U. S. 600, 607. Although the merits are not determined in these instances, formal reversals are entered in order to leave the lower court free to act, though its term has expired, and in order to prevent possibly erroneous decrees of the lower court from being enforced or becoming final by virtue of the expiration of the time to appeal. See *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U. S. 503, 509;

Missouri v. *Public Service Commission*, 273 U. S. 126, 131; *Dorchy* v. *Kansas*, 264 U. S. 286, 291; *Villa* v. *Van Schaick*, 299 U. S. 152, 155, 156; *International Ladies' Garment Workers' Union* v. *Donnelley Garment Co.*, 304 U. S. 243, 251–2; *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902, 903 (C. C. A. 2nd), reversed on other grounds, 274 U. S. 316. In the instant case, however, a reversal would have served no such purpose, since the Board has no term and since the Act specifies no time within which a petition to enforce or review an order of the Board must be made.

Petitioner relies upon *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, as showing that an appellate court may not remand a case even to an inferior court without first setting aside the decree. (Br., p. 49). Plainly, the decision does not support the contention. In that case the term of the District Court had expired[14] (299 U. S. 263, 265), leaving it powerless to reopen its decree, and rendering the Circuit Court of Appeals powerless to bestow any authority upon the District Court to change its decree unless a vacatur was entered. *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S.

[14] The record in that case reveals that the final decree of the District Court was entered on August 26, 1935 (R. 494). The term of the court expired on September 9, 1935 (R. 595). The motion to remand was not made until December 4, 1935, and the order remanding the cause was entered on December 5, 1935 (R. 536). The District Court found as a fact, and it was not disputed by either side, that no motion was made to it until after the end of its term (R. 595).

547; *Delaware, L. & W. R. Co.* v. *Rellstab*, 276 U. S. 1, 5; *United States* v. *Mayer*, 235 U. S. 55, 67; *Sibbald* v. *United States*, 12 Pet. 488, 492.[15] The only question was whether the ambiguous order of the Circuit Court of Appeals was to be construed as containing a reversal. The merits were not considered.

The reasons which required a vacatur of the order of the District Court in the *Duke* case thus have no application here. The Board has no term, and no particular form of order by the Circuit Court of Appeals was necessary to enable the Board to take the further proceeding which it wished. The case having been remanded to it, the Board could, upon reasonable notice, set aside its order in whole or in part. Probably it would have the power to do so even in the absence of the specific statutory grant of power contained in Section 10 (d), *infra*, p. 62. Cf. *Louisville & Nashville R. R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 225.

Petitioner also points out (Br., pp. 50–57) that in some of the cases involving review of orders of the Federal Trade Commission or other administrative agencies, reversals were ordered in connection with the remand. In none of the cases, however, has it ever been held that a reversal is necessary. Nor, we submit, should it be. To argue as

[15] The only exception is with respect to a continuing injunction. *United States* v. *Swift & Co.*, 286 U. S. 106, 114; *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. (2d) 182, 184 (C. C. A. 2d), certiorari denied, 278 U. S. 623.

petitioner does is to argue that a court must take upon itself the burden of deciding questions which further administrative proceedings may render moot. The contention not only imposes a completely unnecessary rigidity upon the procedure of court review of administrative orders, but runs counter to the well settled policy that a court will not itself attempt to decide issues where they may be determined by further administrative proceedings. *Porter* v. *Investors Syndicate*, 286 U. S. 461, 468; *United States* v. *Illinois Central R. R. Co.*, 291 U. S. 457, 463; *Utley* v. *St. Petersburg*, 292 U. S. 106, 109–110. The present case serves as an admirable illustration of the desirability of the existence of the power to remand without a setting aside of the order.

We submit, therefore, that if the court had jurisdiction of the cause by reason of petitioner's petition to review, its order was correct, and should be affirmed.

CONCLUSION

The order of the court below in No. 182 was correct and should be affirmed. The order of the court below in No. 183 should be reversed on the ground that the court was without jurisdiction to enter it, and the cause should be remanded with instructions to dismiss the petition for lack of jurisdiction. If,

however, the court had jurisdiction to enter the order, its decision was correct and it should be affirmed.

Respectfully submitted.

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DECEMBER, 1938.

APPENDIX A

Paragraphs (d), (e), and (f) of Section 10 of the National Labor Relations Act (49 Stat. 449; 29 U. S. C., Supp. III, Secs. 151–166) provide as follows:

> (d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.
>
> (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the

question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the

United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

APPENDIX B

CHRONOLOGICAL STATEMENT

December 22, 1937: Order entered against petitioner by the Board (R. 3).

January 3, 1938: Petition for rehearing filed with the Board (R. 21–31).

January 7, 1938: Board filed petition in No. 182, accompanied by a transcript (R. 1, 6).

January 10, 1938: Board filed supplemental transcript of record to include petitioner's return to the Board's decision and order (R. 8).

April 11, 1938: Petitioner filed its answer to the Board's petition for enforcement (R. 9–34).

April 25, 1938: This Court decided *Morgan* v. *United States*, 304 U. S. 1.

April 29, 1938: Board served upon petitioner's counsel a notice of motion for leave to withdraw its petition for enforcement (R. 35).

May 2, 1938: Notice of motion and motion for leave to withdraw petition for enforcement filed in the Circuit Court of Appeals for the Sixth Circuit (R. 35, 36).

May 4, 1938: Petitioners filed their petition for review of the order of the Board (R. 62).

May 3 (4?), 1938: Petitioner serves upon Board a notice of motion to consolidate causes (R. 38).

May 4, 1938: Notice of motion and motion by petitioner to consolidate the petition of the Board for enforcement and petition of the petitioner for review filed in court (R. 38, 39). The mo-

tion also requested that the court direct that the transcript of record filed in the Board's case be deemed to be filed in the consolidated cause (R. 41).

May 5, 1938: Petitioner filed memorandum in opposition to motion of the Board for leave to withdraw its petition without prejudice and to withdraw the transcript of record (R. 41).

Court entered order granting Board's motion of May 2 (R. 51).

Petitioner served Board with notice of motion to compel the Board to certify a transcript of record and for further relief (R. 77).

Petitioner filed notice of motion and motion to compel the Board to certify a transcript of the record and for an injunction against any further action by the Board or any of its agents until five days after the record had been furnished to petitioner (R. 77, 78).

May 6, 1938: Board served notice on petitioner that unless sufficient cause to the contrary be shown, the Board would, on May 10, 1938, vacate and set aside its findings and order (R. 54).

May 9, 1938: Board filed opposition to petitioner's motions of May 4 and 5 (R. 51).

Order entered by the court amending its order of May 5, 1938, insofar as it permits the withdrawal of the certified transcript of record and ordering that the certified transcript remain in the files of the court (R. 54).

Order entered by the court that a certified transcript of the record in the Board's case be deemed forthwith to have been filed in petitioner's case as of the time of the filing in this

court by petitioner of its petition to review (R. 80).

May 10, 1938: Petitioner objects that by reason of the pendency of the petition to review the Board was without jurisdiction to proceed pursuant to its notice of May 6. The Board holds its action under advisement (R. 87).

May 19, 1938: Notice of motion and motion filed by the petitioner for leave to amend its petition for review (R. 81).

May 23, 1938: Board files opposition to motion for leave to amend petition (R. 83).

May 31, 1938: Supreme Court decides *In re Petition of National Labor Relations Board,* No. 21, Original, October Term, 1937 (Reprinted R. 90–102).

June 1, 1938: Notice of motion filed by the Board to vacate the order of May 9 directing that the certified transcript of the record filed in the Board's case be deemed filed in the petitioner's case (R. 85).

June 2, 1938: Motion filed by the Board pursuant to notice of motion filed on June 1 (R. 85).

Board withdraws the petition for enforcement pursuant to the order of May 5, 1938 (R. 55).

Board filed notice of motion and motion in petitioner's case to remand it to the Board, conditioned on the court's denial of the Board's motion filed on June 2 to vacate the court's order of May 9 (R. 102, 103).

June 4, 1938: Petitioner filed notice of motion and motion to vacate the order of May 5, 1938, granting the motion of the Board for leave to

withdraw its petition for enforcement (R. 55, 56).

June 6, 1938: Board filed opposition to petitioner's motion of June 4 (R. 56).

Petitioner filed notice of motion and motion for leave to amend petition for review (R. 105, 106).

June 10, 1938: Court denied petitioner's motion of June 4 to vacate the court's order of May 5, but stayed for 30 days the withdrawal of the Board's petition for enforcement pending the application for a writ of certiorari (R. 58).

June 10, 1938: Order entered by the court (R. 108):

a. denying petitioner's motion of May 19, 1938, for leave to amend its petition for review;

b. denying petitioner's motion of June 6, 1938, for leave to amend its petition for review;

c. denying the Board's motion of June 2, 1938, to vacate the order of May 9, 1938, directing that the transcript filed in the Board's case should be treated as filed in the petitioner's case, granting the Board's motion of June 2, 1938, to remand the petitioner's case to the National Labor Relations Board for the purpose of setting aside the Board's finding and order. This order is stayed for 30 days pending application for certiorari.

July 7, 1938: Petition for certiorari filed by petitioner to review the orders of May 5, 1938, and June 10, 1938.

October 10, 1938: Certiorari granted in each case.

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SUPREME COURT OF THE UNITED STATES.

Nos. 182, 183.—October Term, 1938.

Ford Motor Company, Petitioner,
182 *vs.*
National Labor Relations Board.

Ford Motor Company, Petitioner,
183 *vs.*
National Labor Relations Board.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 3, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This case presents the question of the propriety of the action of the Circuit Court of Appeals in remanding a cause to the National Labor Relations Board for the purpose of setting aside its findings and order, and issuing proposed findings, and making its decision and order upon reconsideration.

The National Labor Relations Board, on December 22, 1937, entered an order against petitioner directing it to desist from described practices and to offer reinstatement, with back pay, to certain discharged employees.

On January 7, 1938, the Board filed its petition in No. 182 (called the Board's proceeding) in the Circuit Court of Appeals, seeking the enforcement of its order, and at the same time filed the transcript of the record.

On April 4, 1938, petitioner asked leave to adduce additional evidence. On April 11, 1938, petitioner filed its answer to the Board's petition, alleging that the order was invalid and asking that it be set aside upon the grounds, among others, that the Board had failed to accord petitioner a full and fair hearing, and that the Board had not itself considered the evidence but had adopted as its own a decision prepared by its subordinates without affording petitioner any opportunity to be heard thereon. It was also alleged that the findings were not supported by the evidence. Petitioner moved for a commission to take the depositions of witnesses, and served interrogatories upon the Board.

On May 2, 1938, after our decision in *Morgan* v. *United States* (April 25, 1938), 304 U. S. 1, the Board filed a motion for leave

to withdraw its petition for enforcement and the transcript of record, without prejudice. The Board stated that, should its motion be granted, it would set aside its order, would issue proposed findings with permission to the parties to file exceptions and present argument, and thereafter make its decision and order. On May 5, 1938, the court granted the Board's motion. On May 6, 1938, the Board served notice on petitioner of its intention to vacate its findings and order of December 22, 1937, but later in view of petitioner's objection held that action under advisement. On May 9, 1938, the order of May 5th was amended so far as it permitted the withdrawal of the transcript of record and the court directed that the transcript remain on file. On June 2, 1938, the Board purported to withdraw its petition for enforcement. On June 4, 1938, the petitioner moved to vacate the order of May 5th. That motion was denied on June 10, 1938, with a stay of the withdrawal of the Board's petition pending application here for writ of certiorari.

Meanwhile, on May 4, 1938, the petitioner filed with the Circuit Court of Appeals in No. 183 (called the petitioner's proceeding) its petition asking the court to review and set aside the Board's order of December 22, 1937. On May 9, 1938, the court directed that the transcript of record filed in the Board's proceeding should be deemed to have been filed in the petitioner's proceeding to review as of the date of May 4th. On June 2, 1938, the Board filed a motion to vacate that order of May 9th. At the same time the Board moved that in the event of a denial of that motion the case should be remanded to the Board for further proceedings.

On June 10, 1938, the court entered its order denying certain motions of the petitioner for leave to amend its petition for review, denying the Board's motion to vacate the order of May 9th, and granting the Board's motion of June 2d—

"to remand this cause to the National Labor Relations Board for the purpose of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case".

[1] Because of the importance of the questions presented in relation to the scope of the court's jurisdiction and its appropriate exercise, certiorari was granted to review the order of May 5th, granting the Board's motion to withdraw its petition for enforcement, and the order of June 10th, remanding the cause as above stated. October 10, 1938.

First. The authority conferred upon the Board by Section 10(d)[1] of the National Labor Relations Board, to modify or set aside its findings and order, ended with the filing in court of the transcript of record. Upon the filing of the transcript in connection with the Board's petition for enforcement, and notice, the Circuit Court of Appeals had jurisdiction of the proceeding as provided in Section 10(e) of the Act, as follows:

"Upon such filing [of the transcript], the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . . The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . .".

Under Section 10(f) the jurisdiction of the Circuit Court of Appeals is of the same character and scope in a proceeding for review brought by a person aggrieved by an order of the Board as the jurisdiction which the court has in a proceeding instituted by the Board for enforcement.[2]

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[1] Section 10(d) provides:

"(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it".

[2] Section 10(f) provides:

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in . . . by filing in such court a written petition praying that the order of the Board

While Section 10(f) assures to any aggrieved person opportunity to contest the Board's order, it does not require an unnecessary duplication of proceedings. The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review. Where the Board has petitioned for enforcement under Section 10(e) and the jurisdiction of the court has attached, no separate proceeding is needed on the part of the person thus brought into the court. The breadth of the jurisdiction conferred upon the court to set aside or modify in whole or in part the Board's order, or to permit new evidence to be taken, necessarily implies that the party proceeded against is entitled to raise all pertinent questions and to obtain any affirmative relief that is appropriate. Here, petitioner in the Board's proceeding had sought affirmative relief and had taken steps to establish that right. Considering the scope and purpose of the jurisdiction of the court in a proceeding under Section 10(e), and the position and rights of the person proceeded against, we are unable to conclude that the Board has an absolute right to withdraw its petition at its pleasure. We think that permission to withdraw must rest in the sound discretion of the court to be exercised in the light of the circumstances of the particular case.[3]

While in the instant case there are two proceedings, separately carried on the docket, they were essentially one so far as any question as to the legality of the Board's order was concerned. Petitioner's answer in the Board's proceeding presented substantially the same objections as those raised in petitioner's proceeding for review. The present contentions of the parties are largely addressed to procedural distinctions, but if we follow the course of

be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive".

[3] See Cooper *v.* Lewis, 2 Phillips, Ch. 177, 181; Bank *v.* Rose, 1 Rich Eq., 292, 294; Stevens *v.* The Railroads, 4 Fed. 97, 105; Chicago & Alton R. R. Co. *v.* Union Rolling Mill Co., 109 U. S. 702, 713-715; City of Detroit *v.* Detroit City Rwy. Co., 55 Fed. 569, 572, 573; Pullman Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 146; Ex parte Skinner & Eddy Corporation, 265 U. S. 86, 93, 94; United Motor Service *v.* Tropic Aire, 57 F. (2d) 479, 481, 482; Jones *v.* Securities Commission, 298 U. S. 1, 19, 20.

the two proceedings we find that there is really but one ultimate question and that is with respect to the court's final action in remanding the cause to the Board for further proceedings.

Before the court on May 5th granted the Board's motion to withdraw its petition, the other proceeding had been instituted by the filing of the petition for review on May 4th. That proceeding was taken by petitioner as a person aggrieved by the order of December 22, 1937, and was doubtless prompted by the Board's motion to withdraw its own petition. As the transcript of the record of the administrative proceeding had already been certified and filed, it was within the court's control. The order of May 5th was amended on May 9th so as to preclude the withdrawal of the transcript, and on the same day the court ordered that the transcript be deemed to be filed in the petitioner's proceeding as of May 4th. We see no reason to doubt the power of the court to retain the transcript or to amend its order of May 5th accordingly, and certiorari has not been sought by the Board in relation to the order of May 9th. Our decision *In re Matter of the National Labor Relations Board*, 304 U. S. 486, is not apposite. There the transcript had not been filed, the court had not acquired jurisdiction of the subject matter, and the Board still had the authority conferred upon it by Section 10(d). In the circumstances of the present case we think it is clear that the court was possessed of exclusive jurisdiction of the administrative proceeding "and of the question determined therein", and thus of the power of "enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board". Sec. 10(f.) As on the Board's petition the court could grant affirmative relief to the person against whom the Board's order was directed, so on the court's entertaining the petition of that person for review the Board could seek not merely to have the petition denied but to have its order enforced, regardless of any separate proceeding to that end.

It thus appears that neither the order of May 5th, granting the Board permission to withdraw its petition, nor the attempt of the Board on May 6th to reassume control of the administrative proceeding, nor the Board's withdrawal of its petition on June 2d, accomplished anything of substance, as the Board, in the presence of the court's continued and exclusive jurisdiction, remained without authority to deal with its order. And any question as to the propriety of the court's order of May 5th became one of merely academic interest after the court by its order of June 10th re-

manded the cause to the Board. We turn to the consideration of that order.

Second. The cause was remanded to the Board for the purpose "of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case". The Board in its application for the remand stated that it would take that course. The specified purpose qualified the court's order. It created a condition which the Board was bound to observe. If the Board within a reasonable time failed to set aside its findings and order, we have no doubt that the court could vacate its order of remand and proceed with its consideration of the petition to review. The propriety of the order of remand must be considered in that aspect.

Third. If the court itself had set aside the findings and order of the Board upon the ground, as asserted by petitioner, that the Board had not considered the evidence and made its own findings, but had adopted as its own a decision proposed by its subordinates without affording petitioner any opportunity to be heard thereon, the court could have remanded the cause for further proceedings in conformity with its opinion. That ground being sufficient for setting aside the order, there is no principle of procedure in relation to the review either of judicial decrees or administrative orders which would require the court to examine other grounds of attack.

It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied.[4] Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points.[5] So, when a District Court has not made findings in accordance with our controlling rule (Equity Rule 70½) it is our practice to set aside the decree and remand the cause for further proceedings.[6] The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial

[4] Estho *v.* Lear, 7 Pet. 130; Levy *v.* Arredondo, 12 Pet. 218; Villa *v.* Van Schaick, 299 U. S. 152, 155, 156.

[5] Chicago, Milwaukee & St. Paul Ry. Co. *v.* Tompkins, 176 U. S. 167, 179, 180; United States *v.* Rio Grande Irrigation Co., 184 U. S. 416, 424; Lincoln Gas & Electric Light Co. *v.* Lincoln, 223 U. S. 349, 361-365.

[6] Railroad Commission *v.* Maxcy, 281 U. S. 82; Interstate Circuit, Inc. *v.* United States, 304 U. S. 55.

action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements. The statute with respect to a judicial review of orders of the Labor Relations Board follows closely the statutory provisions in relation to the orders of the Federal Trade Commission, and as to the latter it is well established that the court may remand the cause to the Commission for further proceedings to the end that valid and essential findings may be made. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 583; *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291, 297; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 218; *Procter & Gamble Co.* v. *Federal Trade Commission*, 11 F. (2d) 47, 48, 49; *Ohio Leather Co.* v. *Federal Trade Commission*, 45 F. (2d) 39, 42.[1] Similar action has been taken under the National Labor Relations Act in *Aguilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146, 155. See, also, *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 91 F. (2d) 509, 515. The "remand" does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law. See *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 262, 278.

Such a remand does not dismiss or terminate the administrative proceeding. If findings are lacking which may properly be made upon the evidence already received, the court does not require the evidence to be reheard. *Federal Trade Commission* v. *Curtis Publishing Co., supra; International Shoe Co.* v. *Federal Trade Commission, supra.* If further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken. *Federal Trade Commission* v. *Royal Milling Co., supra; Procter & Gamble Company* v. *Federal Trade Commission, supra; Ohio Leather Company* v. *Federal Trade Commission, supra; Aguilines, Inc.* v. *National Labor Relations Board, supra.* Whatever findings or order may subsequently be made will be subject to challenge if not adequately supported or the Board has failed to act in accordance with the statutory requirements.

Fourth. The present controversy thus comes to the narrow point that instead of setting aside the Board's findings and order, the

[1] Compare Texas & Pacific Rwy. Co. *v.* Interstate Commerce Commission, 162 U. S. 192, 238, 239; Southern Railway Co. *v.* St. Louis Hay & Grain Co., 214 U. S. 297, 302; Florida *v.* United States, 292 U. S. 1, 9; Brotherhood of Railroad Trainmen *v.* National Mediation Board, 88 F. (2d) 757, 761.

court has allowed the Board itself to set them aside. The contention on that ground is without substance. In either event the findings and order are vacated. Petitioner's objection to the order because of lack of due hearing results in the abandonment of the findings and order and petitioner will thus be completely freed from any determination they contain or any obligation they impose.

Petitioner says that the Board has not confessed error. This is immaterial if the assailed findings and order are set aside. Nor is it important that the court has not held the findings and order to be void. It is elementary that the court is not bound to determine questions which have become academic.

There is nothing in the statute, or in the principles governing judicial review of administrative action, which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record, or making additional findings where these are necessary, or supplying findings validly made in the place of those attacked as invalid. The application for remand in this instance was not on frivolous grounds or for any purpose that might be considered dilatory or vexatious. Petitioner had raised a serious question as to the validity of the findings and order. The Board properly recognized the gravity of the contention and sought to meet it by voluntarily doing what the court could have compelled. That was in the interest of a prompt disposition, and whatever delay has resulted is due to petitioner's resistance to that course.

Petitioner insists that it had other objections to the Board's conduct of the proceeding. But it was not necessary for the court to consider them, as the setting aside of the findings and order carried with it the opportunity for reconsideration and the making of a new record. What findings or order would thus be made became a matter of conjecture and in any event these and the manner of arriving at them would be subject to any justified criticism.

As the substantial question is presented by the order of June 10th, the writ of certiorari in No. 182 is dismissed. The order of June 10th in No. 183 is affirmed.

It is so ordered.

Mr. Justice ROBERTS did not hear the argument and took no part in the consideration and decision of this case.